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South Africa: – A global leader in ESG

South Africa's laws are considered some of the most progressive in the world, and already ensure adequate consideration of E, S and G risks, impacts and opportunities since at least the 1990s



Overview

Various South African laws regulate **Environment “E”**, **Social “S”** and/or **Governance “G”** components, and companies must therefore understand the full scope of their obligations in these respects and how they interact in the company's risk and impact frameworks.

South Africa's laws are considered some of the most progressive in the world, and already ensure adequate consideration of E, S and G risks, impacts and opportunities since at least the 1990s.

By operating in SA, companies already tick many ESG boxes purely by complying with the law.

International trends are moving towards consolidated ESG regulatory frameworks, for example, in disclosure and reporting regimes. South Africa does not yet have such legislation, but voluntary guidance already exists and will set the tone for future regulatory developments.



How is South Africa meeting the challenges of ESG?

By addressing all 17 of the United Nations Sustainable Development Goals (UNSDG)






At the global level, the UNSDG serves as a **high-level forum for joint policy formation and decision-making.**

The Sustainable Development Goals (SDGs) are the blueprint to achieve a better and more sustainable future for all.

They address the global challenges we face, including those related to:

- poverty,
- inequality,
- climate,
- environmental degradation,
- prosperity,
- peace, and
- justice.

Comparative review: Global ESG trends/metrics & United Nations Sustainability Goals (UN SDGs) vs existing SA laws

Environmental		 UN SDGs
<p>Sustainable development</p> <p><i>The principles underlying SD emerge mainly from "soft law" instruments, such as declarations and conventions, and carry only a persuasive force. There are moves to make the right to a healthy environment a constitutional right in many jurisdictions.</i></p>	<p>In South Africa, sustainable development is enshrined and codified in section 24 of the Constitution of the Republic of South Africa, 1996 (making SA one of the first countries to make the right to a healthy environment a constitutional right):</p> <p><i>24. Everyone has the right—</i></p> <p><i>(a) to an environment that is not harmful to their health or wellbeing; and</i></p> <p><i>(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—</i></p> <p><i>(i) prevent pollution and ecological degradation;</i></p> <p><i>(ii) promote conservation; and</i></p> <p><i>(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.</i></p> <p>It is also codified in section 2 (<i>National environmental management principles</i>) of the National Environmental Management Act, 1998:</p> <p><i>2. Principles</i></p> <p><i>(3) Development must be socially, environmentally and economically sustainable.</i></p> <p><i>(4) (a) Sustainable development requires the consideration of all relevant factors including the following: [...]</i></p>	
<p>Climate change</p> <p><i>Disclosure guidelines* seek information on (among others) identifying, assessing, prioritising, monitoring, and managing climate-related impacts, risks and opportunities; as well as data on GHG emissions (in metric tonnes of CO2 equivalent and measured in accordance with the Greenhouse Gas Protocol).</i></p>	<p>SA laws include:</p> <ul style="list-style-type: none"> National Environmental Management: Air Quality Act, 2004 National Ambient Air Quality Standards, 2009 Regulations Regarding the Phasing-Out and Management of Ozone-Depleting Substances, 2014 National Atmospheric Emission Reporting Regulations, 2015 Declaration of Greenhouse Gases as Priority Air Pollutants, 2017 National Greenhouse Gas Emission Reporting Regulations, 2016 + Methodological Guidelines for Quantification of Greenhouse Gas Emissions, 2022 National Pollution Prevention Plan Regulations, 2017 <i>[soon to be replaced by the carbon budget system envisaged under the Climate Change Bill]</i> National Climate Change Adaptation Strategy, 2019 Climate Change Bill, 2022 <i>[soon to be promulgated into law]</i> Carbon Tax Act, 2019 Draft National Guideline for Climate Change Impact Assessments in applications for environmental consents, 2021 Municipal by-laws 	







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Comparative review: Global ESG trends/metrics vs existing SA laws

Environmental UN SDGs

Biodiversity loss

*The growing international acknowledgement of biodiversity loss as a systemic and financial risk, combined with market, social and regulatory developments, provide a robust context to help understand the changing interpretation of statutory duties. Evolving disclosure recommendations for companies in relation to biodiversity indicate that directors' duties of care, loyalty and disclosure permit (and may even require) them to govern the management of biodiversity risks.**

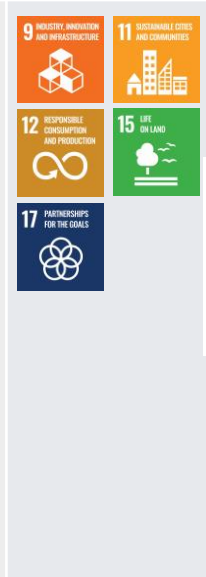
- SA laws include:
- National Environmental Management: Biodiversity Act, 2004 + National Environmental Management: Protected Areas Act, 2003 + National Forests Act, 1998
 - National Biodiversity Framework (2019 to 2024)
 - National List of Ecosystems that are Threatened and in Need of Protection *[revised and updated in 2022]*
 - Alien and Invasive Species Regulations and Lists *[revised and updated in 2020]*
 - Bioprospecting, Access and Benefit-Sharing Amendments Regulations, 2015
 - Norms and Standards for Biodiversity Management Plans for Ecosystems, 2014 + Norms and Standards for Biodiversity Management Plans for Species, 2009
 - Mining and Biodiversity Guideline: Mainstreaming Biodiversity into the Mining Sector, 2013
 - Threatened or Protected Species Regulations and Lists, 2007
 - Provincial conservation laws
 - Draft White Paper on Conservation and Sustainable Use of South Africa's Biodiversity, 2022
 - Draft National Biodiversity Offsets Guideline, 2019
 - Draft National Guideline for Ecosystem Impact Assessments in applications for environmental consents, 2021



Circular economy

A circular economy aims to transform the current linear economy into a circular model, to reduce consumption of finite material resources by recovering materials from waste streams for recycling or reuse; using products longer; and exploiting the potential of the sharing and services economy. Circular economy policies and initiatives largely take place domestically at the national or regional level.

- SA laws include:
- National Environmental Management: Waste Act, 2008
 - National Waste Information Regulations, 2012 + Waste Classification and Management Regulations, 2013
 - National Norms and Standards for the Assessment of Waste for Landfill Disposal + National Norms and Standards for Disposal of Waste to Landfill, 2013
 - National Standards for the Scrapping or Recovery of Motor Vehicles, 2013
 - National Norms and Standards for the Remediation of Contaminated Land and Soil Quality, 2014
 - Regulations Regarding the Planning and Management of Residue Stockpiles and Residue Deposits, 2015
 - Regulations for the Control of Import or Export of Waste, 2017
 - National Norms and Standards for the Sorting, Shredding, Grinding, Crushing, Screening or Baling of General Waste, 2017
 - Waste Tyre Regulations, 2017
 - Extended Producer Responsibility Regulations, 2020
 - National Norms and Standards for Organic Waste Composting, 2021 + National Norms and Standards for the Treatment of Organic Waste, 2022
 - Municipal waste management laws



*Commonwealth Climate and Law Initiative (CCLI), 'Biodiversity Risk: Legal Implications for Companies and their Director', published 13 December 2022.


Comparative review: Global ESG trends/metrics vs existing SA laws

Social		UN SDGs
<p>Indigenous Peoples</p> <p><i>Indigenous Peoples often lack formal recognition over their lands, territories and natural resources, are often last to receive public investments in basic services and infrastructure and face multiple barriers to participate fully in the formal economy, enjoy access to justice, and participate in political processes and decision making. This legacy of inequality and exclusion has made Indigenous peoples more vulnerable to the impacts of climate change and natural hazards.*</i></p>	<p>SA laws include:</p> <ul style="list-style-type: none"> National Heritage Resources Act, 1999 National Environmental Management: Protected Areas Act, 2003 National Environmental Management Act, 1998 (in particular, principles around public participation, benefit sharing and empowerment) + National Public Participation Guidelines, 2017 Mineral and Petroleum Resources Development Act, 2002 (in particular, Social and Labour Plan requirements and compensation mechanisms) Mine Community Resettlement Guidelines, 2022 Artisanal and Small-Scale Mining Policy, 2022 Draft Strategy to Address Air Pollution in Dense Low-Income Settlements, 2016 National Policy on Food and Nutrition Security for the Republic of South Africa, 2014 Bioprospecting, Access and Benefit-Sharing Amendments Regulations, 2015 (published under NEM: Biodiversity Act) 	
<p>Working conditions and fair labour practices</p> <p><i>"[When comparing different countries' labour law landscapes,] South Africa is on par, if not more developed, in its legislation around workers rights and creating a fair and equitable environment."</i>⁶</p>	<p>SA laws include:</p> <ul style="list-style-type: none"> Constitution of the Republic of South Africa, 1996 [section 23 right to fair labour practices] Labour Relations Act, 1995 [allows workers to create unions and collectively bargain] Basic Conditions of Employment Act, 1996 [governs working hours, leave, termination] Employment Equity Act, 1998 [established to lessen discrimination in the workplace, and provides parameters for affirmative action] Skills Development Act, 1998 + Skills Development Levies Act, 1999 [promotes worker productivity and competitiveness in the market] Mine Health and Safety Act, 1996 Occupational Health and Safety Act, 1993 Compensation for Occupational Injuries and Diseases Act 130 of 1993 Unemployment Insurance Act, 2001 National Minimum Wage Act, 2018 	













*Cindy Ross, 'How South African Labour Laws Compare to Other Developed Countries', published 2 May 2022.

Comparative review: Global ESG trends/metrics vs existing SA laws

Social		 UN SDGs
<p>Diversity and inclusion (including of vulnerable and marginalised groups)</p> <p><i>“Though diversity and inclusion have become core competencies in HR, and while the importance of the D&I initiative in employment has become generally accepted, the D&I initiative is not rooted in the [US] law.”*</i></p>	<p>SA laws include:</p> <ul style="list-style-type: none"> • Constitution of the Republic of South Africa, 1996 <i>[the first in the world to outlaw discrimination based on sexual orientation]</i> • Employment Equity Act, 1998 • Skills Development Act, 1998 + Skills Development Levies Act, 1999 • Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 • Broad-Based Black Economic Empowerment Act, 2003 <i>[26% ownership is mandatory for Black people (African, Coloured and Indian people who are South African citizens) in mining projects (30% is industry practice), and CSI spend requirements are prescribed. TGME, for example, has the broadest base BEE in SA]</i> • Alteration of Sex Description and Sex Status Act, 2003 • Children’s Act, 2005 + Child Justice Act 75 of 2008 • Civil Union Act, 2006 <i>[SA was the fifth country in the world, and first in Africa, to legalise same-sex marriage]</i> • Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 <i>[codified the law on sex offences in gender- and orientation-neutral terms]</i> • National Intervention Strategy for LGBTI Communities, 2014 • Labour Laws Amendment Act, 2018 <i>[allows same-sex couples, as well as adoptive and surrogate parents, to take parental leave, and fathers to get at least 10 days paternity leave]</i> • Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018 • National Council on Gender Based Violence and Femicide Bill <i>[soon to be promulgated]</i> 	

*American Management Association, ‘D&I in the Workplace: A Legal Perspective’, published 11 December 2020.

Comparative review: Global ESG trends/metrics vs existing SA laws

Governance		 UN SDGs
<p>Board direction, tone and oversight</p> <p><i>The Board should have oversight of sustainability-related impacts, risks and opportunities, and the company's process for integrating sustainability issues into the overall governance approach.</i></p>	<p>SA governance laws include:</p> <ul style="list-style-type: none"> • Companies Act, 2008 • Competition Act, 1998 + International Trade Administration Act, 2002 • Consumer Protection Act, 2008 + National Credit Act, 2005 • Financial Markets Act, 2012 • Income Tax Act, 1962 + Securities Transfer Tax Act, 2007 + Securities Transfer Tax Administration Act, 2007 • Insolvency Act, 1936 • Trust Property Control Act, 1988 • King IV Report on Corporate Governance for South Africa 2016 [now serves as an international benchmark] + King IV Guidance Paper: Responsibilities of Governing Bodies in Responding to Climate Change, 2021 • Johannesburg Stock Exchange Limited (JSE) Sustainability Disclosure Guidance and Climate Disclosure Guidance, 2022 	  
<p>Financial and business crime / ABC</p> <p><i>Business crime is now higher than ever on authorities' list of priorities. With authorities across the world working more closely and globalisation and technological advancements opening new frontiers for perpetrators of business crimes – the risks of corporate misconduct have never been higher.</i></p>	<p>SA laws include:</p> <ul style="list-style-type: none"> • Income Tax Act, 1962 • Prevention of Organised Crime Act, 1998 • Public Finance Management Act, 1999 • Preferential Procurement Policy Framework Act, 2000 • Financial Intelligence Centre Act, 2001 • Local Government: Municipal Finance Management Act, 2003 • Preventing and Combatting of Corrupt Activities Act, 2004 • Protection of Constitutional Democracy against terrorist and related activities Act, 2004 	    
<p>Transparency</p> <p><i>“Companies that don't harness the power of ESG transparency risk losing favor with investors or ceding competitive advantage, and they may also be at a disadvantage when attracting and retaining customers and employees.”*</i></p>	<p>SA laws include:</p> <ul style="list-style-type: none"> • Promotion of Administrative Justice Act, 2000 • Promotion of Access to Information Act, 2000 • Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 • Protected Disclosures Act, 2000 • Protection of Personal Information Act, 2013 	 

*American Management Association, 'D&I in the Workplace: A Legal Perspective', published 11 December 2020.

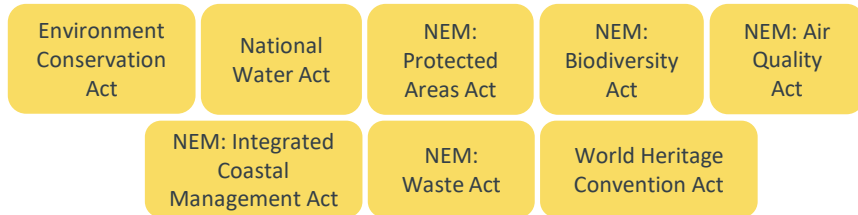


Spotlight on environmental laws and principles in SA

Constitution – s24, s32, s33, Schedules 3 & 4

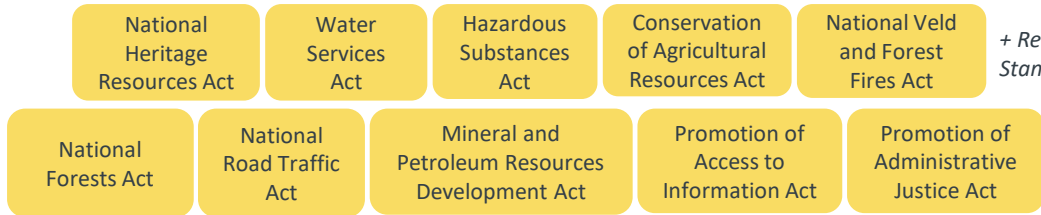
National Environmental Management Act
Umbrella legislation

Specific Environmental Management Acts (SEMAs)



Dedicated statutory "duties of care" are envisaged under most SEMAs, in addition to licensing and regulatory obligations

Other pieces of National legislation



+ Regulations, Norms & Standards, Notices

Provincial Acts and Ordinances



Local By-laws



No person can be civilly or criminally liable, or dismissed, disciplined, prejudiced or harassed, for having refused to perform any work believed at the time to result in an imminent and serious threat to the environment. (section 29, NEMA)

Protection of Workers

No person can be civilly or criminally liable, or dismissed, disciplined, prejudiced or harassed, for having disclosed any information reasonably believed at the time to constitute evidence of an environmental risk. (section 31, NEMA)

Protection of Whistleblowers

Persons/groups may seek relief in respect of any (threatened) breach of environmental legislation in their own interest, in the public interest or in the interest of protecting the environment. (section 32, NEMA)

Horizontal Standing

The responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle. (section 2(4)(e), NEMA)

Cradle-to-Grave Principle

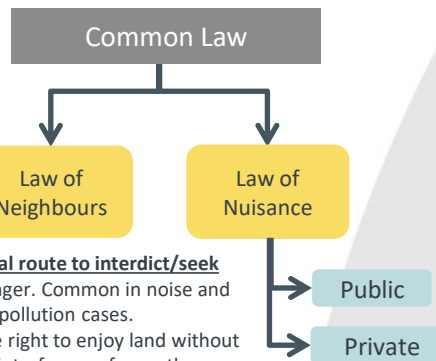
Directors of a company or members of a CC are jointly and severally liable for any negative impact on the environment (whether advertently or inadvertently caused by the company or CC which they represent). They will also be guilty of the said offence and convicted accordingly. (sections 24N(8) and 34(7), NEMA)

Director Liability

The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment. (section 2(4)(p), NEMA)

Mineral right/permit holders remain responsible for environmental liability, pollution or ecological degradation, the pumping and treatment of polluted or extraneous water, the management and sustainable closure thereof notwithstanding the issuing of a closure certificate in terms of the MPRDA. (section 24R, NEMA)

Polluter Pays Principle



Alternative **legal route to interdict/seek** relief from infringer. Common in noise and dust pollution cases. Landowners have right to enjoy land without unreasonable interference from others.

Key Governmental Policies

Just Transition Framework

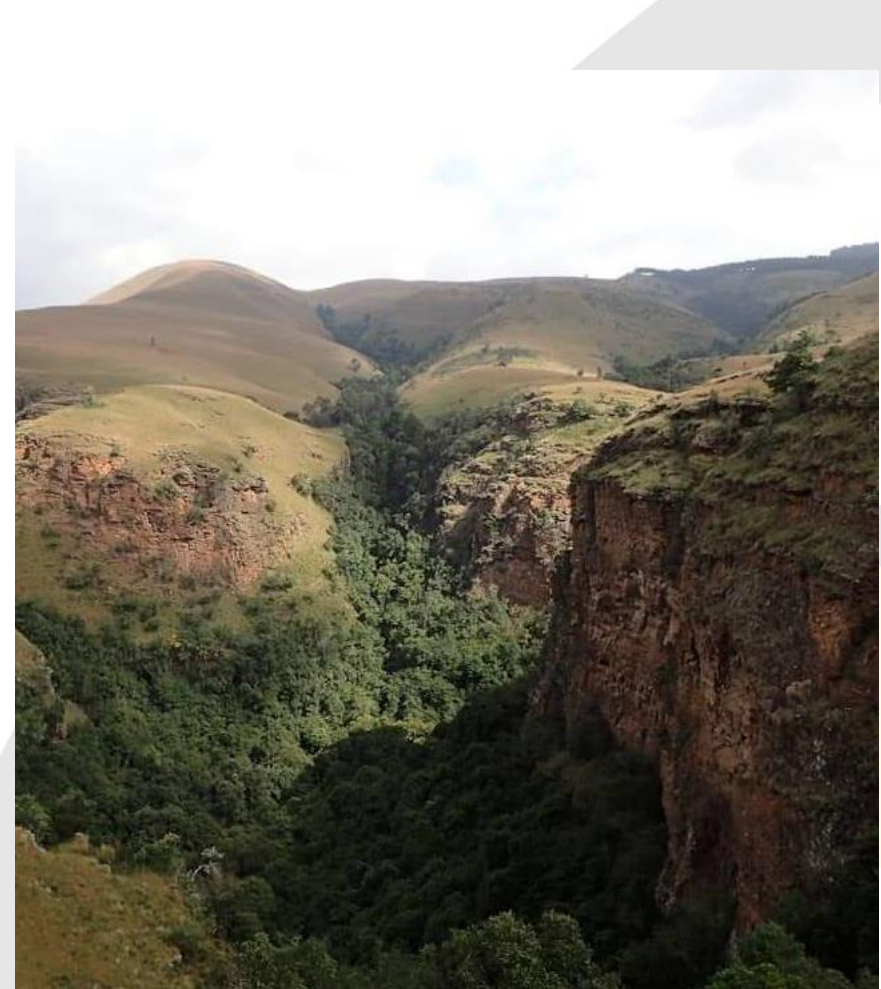
- In June 2022, the Presidential Climate Commission published the Framework for a Just Transition in SA. The just transition framework presents an opportunity to start dealing with practical issues relating to jobs, local economies, skills, social support, and governance when addressing the transition to a lower carbon economy.
- Cabinet approved and adopted the Just Transition Framework on 1 September 2022.

Draft Green Hydrogen Commercialisation Strategy

- In September 2021, Cabinet approved a Hydrogen Society Roadmap for South Africa, developed by the Department of Science and Innovation. In seeking to position SA as a global leader in the Green Hydrogen market, the draft Green Hydrogen Commercialisation Strategy was released for public comment on 9 December 2022.
- This Strategy sets out a commercial framework, which includes (a) strategic objectives for a green hydrogen sector; (b) an assessment of demand drivers; (c) a technical value chain definition and related delivery supply chain options; (d) identification of opportunities to embed local manufacturing and local content; and (e) creating an attractive and enabling investment environment.

Draft National Mine Closure Strategy

- This Strategy intends to support regional mine-closure scenarios and cement the mindset shift in creating a self-sustaining natural ecosystem or alternate land use post-closure.
- The objectives of the draft strategy are to, among others manage the closure of mines in a demarcated area in an integrated and sustainable manner, ensuring that these mines work together to achieve a self-sustaining ecosystem after closure; and integrate environmental management and related closure activities with socio-economic interventions and align these with development of a post-closure economy, by rationalising current wasteful spending on environmental management, social and labour plans and corporate social investment by reducing duplication of efforts and spending by aggregating available funding for coordinated regional projects.



Key Governmental Policies



Exploration Strategy and Exploration Implementation Plan

- SA's Exploration Strategy and Implementation Plan published in April 2022 outlines an economic recovery plan to unlock the country's full mineral potential and the DMRE's plans to increase SA's share of global investment in exploration from 1% to 5% within the next five years.
- The priorities identified in this Strategy are to improve the availability of geoscientific data, revise the licensing regime and attract exploration investment. It identifies certain barriers, which will require changes to regulation and policy.

Artisanal and Small-Scale Mining Policy

- This policy was published and became effective on 30 March 2022.
- The policy aims to create a formalised artisanal and small-scale mining industry that can operate optimally in a sustainable manner while contributing to the economy in the form of taxes, royalties and job creation. It also proposes to eliminate illegal artisanal and small-scale mining operations.

Mine Community Resettlement Guidelines

- These guidelines were published and became effective on 30 March 2022.
- They outline the process for applicants and holders of prospecting and mining rights or mining permits to follow when their operations require the physical resettlement of landowners, lawful occupiers, holders of informal land rights and mine and host communities. They apply to both new and existing operations that are expanding and are intended to apply throughout the lifecycle of the operation, whenever resettlement is necessary.

Key Governmental Policies

Renewable Energy Development (RED) Zones; Strategic Transmission Corridors and Strategic Integrated Projects

- In March 2021, the Minister of Forestry, Fisheries and the Environment introduced various draft notices to incentivise [renewable energy development in specific geographic areas known as RED Zones](#). RED Zones are areas best suited for development of renewables, based on environmental sensitivities and the potential for repurposing existing infrastructure which is reaching the end of its life (e.g., mines), and supporting job creation. The principal regulatory feature is that obtaining environmental approvals for renewable energy development in these areas can be fast-tracked, given that strategic environmental assessments in terms of NEMA have already been carried out. There are now 11 RED Zones in SA.
- In April 2021, the Minister further gazetted a notice identifying expanded geographical areas of strategic importance for the development of electricity transmission and distribution infrastructure, and of procedures to be followed when applying for, or deciding on, EAs for large-scale electricity transmission or distribution development activities. The notice amends and expands the [strategic transmission corridors related to electricity transmission and distribution](#) identified in February 2018.
- In July 2022, the Minister also published a notice in terms of NEMA: (i) adopting the [Standard for the Development and Expansion of Power Lines and Substations within Identified Geographical Areas](#) Revision 2 June 2022 (Standard); and (ii) excluding specific NEMA listed or specified activities necessary for the realisation of the development or expansion of power line and substation infrastructure from the requirement to obtain an EA (in certain prescribed circumstances).
- [Strategic infrastructure projects \(SIPs\)](#) designated under the infrastructure Development Act benefit from additional truncated licensing processes.
- Additional interventions are planned for further streamlining the EA process for solar PV and wind projects.



Benchmarking against international frameworks

JSE Sustainability- and Climate Disclosure Guidance

- In 2022, the Johannesburg Stock Exchange Limited (JSE) launched its Sustainability Disclosure Guidance and Climate Disclosure Guidance.
- These documents are not intended to replace any of the influential global initiatives, but rather seek to help companies navigate the landscape of reporting standards without being onerous, and to provide explicitly for the South African context.
- They consider the many ESG metrics currently available and highlight those that are generally well-established, universal, industry-agnostic and that the JSE believes to be material in the South African context.

SA Green Finance Taxonomy (GFT)

- In 2022, National Treasury published the GFT as part of government's national policy to promote sustainable finance and encourage green private sector initiatives.
- The GFT is currently centred around six objectives: climate change mitigation, climate change adaptation, sustainable use of water and marine resources, pollution prevention, sustainable resource use and circularity, and ecosystem protection and restoration.
- As with the EU Taxonomy, the main focus is therefore on the "E" in ESG. However, the "S" in ESG is incorporated insofar as users of the GFT must comply with minimum social safeguards, by evaluating whether their projects are aligned with South African labour laws and the standards in the International Labour Organisation's core labour conventions; the OECD Guidelines on Multinational Enterprises; and the UN Guiding Principles on Business and Human Rights.
- Compliance with the GFT is still voluntary.

ESG progress in the South African context is to truly share wealth, assisting and making a great man's dream for his people come TRUE!!!!

“Overcoming poverty is not a task of charity, it is an act of justice. Like slavery and apartheid, poverty is not natural. It is man-made and it can be overcome and eradicated by the actions of human beings.”

“A fundamental concern for others in our individual and community lives would go a long way in making the world the better place we so passionately dreamt of.”

“It is not our diversity which divides us; it is not our ethnicity, or religion or culture that divides us. Since we have achieved our freedom, there can only be one division amongst us: between those who cherish democracy and those who do not.”

“For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others.”

“There is a universal respect and even admiration for those who are humble and simple by nature, and who have absolute confidence in all human beings irrespective of their social status.”

“As long as many of our people still live in utter poverty, as long as children still live under plastic covers, as long as many of our people are still without jobs, no South African should rest and wallow in the joy of freedom.”

“A nation should not be judged by how it treats its highest citizens, but its lowest ones.”

- Nelson Mandela

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